STATE OF NORTH CAROLINA   IN THE OFFICE OF INFORMATION
                                                      TECHNOLOGY SERVICES
COUNTY OF WAKE   OAH FILE 04-DHR-1066

EDS INFORMATION SERVICES, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
OFFICE OF INFORMATION	)	
TECHNOLOGY SERVICES and	)	**FINAL AGENCY DECISION**
NORTH CAROLINA DEPARTMENT	)	**ON MOTIONS FOR SUMMARY**
OF HEALTH AND HUMAN SERVICES,	)	**JUDGMENT**
	)	
Respondents,	)	
	)	
and	)	
	)	
ACS STATE HEALTHCARE, LLC,	)	
	)	
Respondent-Intervenor.	)	
	)	

PROCEDURAL HISTORY

This contested case under Article 3A of the Administrative Procedure Act ("Act") was initiated by EDS' protest letter to Secretary Carmen Hooker Odom of the N.C. Dept. of Health and Human Services. EDS protests the contract award by the North Carolina Department of Health and Human Services ("DHHS"), as approved by ITS, of the North Carolina Medicaid Management Information System ("NCMMIS+") pursuant to Request for Proposal No. 30-DHHS-736-04 (the "RFP"). The protest letter was dated 23 April 2004. A hearing was held pursuant to 9 NCAC 06B.1009(c) on 24 May 2004, and Secretary Odom's written decision was issued on 3 June 2004. Secretary Odom denied each of the eight (8) issues identified in EDS' protest letter. EDS timely filed a Request for Administrative Hearing with the Office of Information Technology Services ("ITS") on 10 June 2004. EDS is an aggrieved person as defined in G.S. §150B-2. Pursuant to N.C. Gen. Stat. § 150B-40(e) the State Chief Information Officer, CIO, requested that the Office of Administrative Hearings appoint an Administrative Law Judge to hear the contested case. Senior Administrative Law Judge Fred Morrison, Jr. ("ALJ Morrison") was assigned to preside in this case. ACS State Healthcare, LLC ("ACS") ("Intervenor"), was permitted to intervene.

A hearing on EDS' motion for summary judgment was held before ALJ Fred Morrison on December 29, 2004. The motion was supported by exhibits and deposition transcripts, and responses were filed by ITS/DHHS (the "State" or "Respondents") and ACS, including exhibits and affidavits. J. Mitchell Armbruster and B. Davis Horne, Jr. appeared on behalf of Petitioner; James Wellons appeared on behalf of the Respondent; and Renee Montgomery appeared on behalf of the Intervenor. A hearing on ACS' motion for summary judgment was held before ALJ Morrison on January 7, 2005. Mark A. Ash, Esq., J. Mitchell Armbruster, Esq., and David Horne, Esq., appeared on behalf of EDS, James Wellons, Esq., Emery Milliken, Esq., and R. Marcus Lodge, Esq., appeared on behalf of the Respondent, and Renee J. Montgomery, Esq., and Susan Dunathan, Esq., appeared on behalf of the Intervenor, ACS. ALJ Morrison issued proposed rulings on both motions on January 11, 2005: to grant summary judgment for Petitioner and to deny summary judgment for Respondents, with the denial based upon mootness.

Pursuant to G.S. § 150B-40(e) and the Order of the undersigned, Parties delivered a record containing written materials to the undersigned on March 11 2005 and oral arguments were made on March 15, 2005. The record in this matter is extensive, but does not include materials from the Information Resources Management Council (IRMC) that are relevant to Petitioner's leading argument relating to the Statewide Technical Architecture. Therefore, Official Notice of such materials, pursuant to N.C.G.S. §150B-42(d), and Rule 201 of the N.C. Rules of Evidence is noted in various Findings. The record includes all depositions referenced herein, but the depositions were not accompanied by the exhibits presented therein. The Parties are commended for supplying most of the deposition exhibits as exhibits to other filings, as these were helpful in examination of the record and arguments of the Parties.

ISSUES FOR DECISION, GROUNDS FOR PROTEST

Despite the volume of pleadings in this matter, issues have not been distilled by the Parties to an extent that each may be concisely stated here with confidence. EDS presented eight (8) bulleted statements in its protest letter, and appended a twenty-nine-page statement identified as "EDS Grounds for Protest." EDS' request for an administrative hearing contained a general statement establishing a basis for proceeding as an aggrieved party, but indicated that a statement of facts and issues would be provided in a prehearing statement. EDS' subsequent prehearing statement presented seven (7) bulleted statements, differing from those of its Grounds for Protest document, and appended the same Grounds for Protest document submitted to Secretary Carmen Hooker Odom. These bulleted statements appear to be either reasons or conclusions, but not legal issues for resolution. The Grounds for Protest, however, identifies arguments that appear to correspond to the bulleted items. These arguments are presented below as identified by EDS:

I. ACS Failed to Comply in Material Respects With Mandatory Requirements

  A. ACS' Technical Solution Fails to Satisfy the State's Minimum Architecture Requirements

    (1) ACS Failed to Propose a 3-Tier Design

    (2) ACS' Solution Does Not Utilize a Single, Consistent User Interface

(3) ACS' Design Does not Utilize a Thin Client Interface

(4) The ACS Design is Neither Extensible Nor Scalable

(5) The ACS Document Management System is Non-Compliant

(6) The ACS Solution Does Not Provide the State With the Required Newer Technology

B. ACS' Proposal Fails to Comply With Mandatory Facilities and Staffing Requirements

(1) Key Personnel Experience

(2) Facility and Staff Location

II.   ACS Did Not Comply With the Mandatory Pricing Requirements of the RFP

III.   ACS' Perceived Price Advantage is Illusory and in any Event Was Miscalculated by the State

IV.   The Evaluation Impermissibly Deviated From the Evaluation Criteria Stated in the Solicitation

A. The Evaluators Deviated From the Relative Weightings of the Technical and Price Evaluation Factors

B. The State Evaluated Unstated Factors and Disregarded Others Set Forth in the Solicitation.

EDS' Motion for Summary Judgment presents arguments addressing I.A. and IV; and additional argument relating to "oral presentations" and "clarifications" that is not identified in the Protest letter, Grounds for Protest, Request for Administrative Hearing or Prehearing Statement. Respondents filed a Motion for Summary Judgment on all grounds other than those presented by EDS. Issues II and III have not been argued by the Parties, and the record does not appear sufficient to grant summary judgment for Respondents or EDS.

As the Petitioner, EDS has the burden of proof to show, by substantial evidence under N.C.G.S. §150B-42, that it is entitled to summary judgment. Hence, the undersigned has first examined the record and EDS' argument(s) that the ACS solution failed to meet the requirements of the RFP, then examined the record and EDS' argument(s) that a procedural error was made in the procurement.

Each Finding and Conclusion of Law is set forth as proposed with deleted text marked as "strikeouts" and additional text marked in italics. Explanations and justifications for these changes are included where necessary. Additional Findings of Fact and Conclusions of Law were made; these follow the Findings and Conclusions, respectively.

After reviewing the extensive record in this matter forwarded by the OAH, reviewing the written arguments of the Parties and hearing their oral presentations as required by N.C.G.S. 150B-40(e), this Order is entered as the Final Agency Decision:

FINDINGS OF FACT

1.   *Official notice may be taken of facts within the specialized knowledge of an agency, and facts that are properly noticed under principles of judicial notice. N.C.G.S. §150B-41(d), 9 NCAC 06B.1028(f). The Information Management Resources Council (IRMC) is discussed in several depositions, but the record does not include relevant information regarding the role and authority of the IRMC. Official notice is taken of the following:*

N.C.G.S. §147-33-78 (2003) Information Resources Management Council

IRMC materials at the following web sites: http://www.scio.state.nc.us/Statewide_Projects.asp; http://www.scio.state.nc.us/Meeting_Agendas_Materials.asp; http://www.scio.state.nc.us/sitPolicies_ListArchive.asp?Certification; http://dev.scio.state.nc.us/sitPolicies_ListArchive.asp?Technical%20Architecture%20Standards

Statewide Technical Architecture documents located at: http://www.ncsta.gov/

IRMC TAPCC Committee minutes as archived with ITS pursuant to S.L. 2004-129.

Justification: Testimony regarding the IRMC, its authority, history, policies and procedures is elicited in depositions of Emilie Schmidt, Dep. Vol. I pp. 36, 49, 54, 54, 55-56, 63-65, 80, 84-87, 107, 116, 117, 126-127, Vol. II pp. 146-150, 180-181, 248-250, 253; Mark Griffith Dep. pp. 43, 185, 194, 244, 254; Angeline Sligh, Dep. Vol. I p. 22, Vol. II p. 70. However, the record does not contain documents sufficient to provide a more complete factual and legal basis for the IRMC and its role regarding Information Technology procurements.

2.   *The Information Resources Management Council (IRMC) was a legislatively created commission charged with certain authority and duties relevant to matters involving Information Technology Procurement, technical standards, and the Statewide Technical Architecture. N.C.G.S. §147-33-78 (2003). The IRMC comprised 21 members representing multiple state agencies and non-governmental interests. Id. IRMC project certification required vendors to complete and submit a System Design document.   This document was used in the MMIS+ procurement and referred to as the Logical System Design. ACS' submission is identified as DeVos Deposition Exhibit 14 and as Appendix H to Petitioner's Motion for Summary Judgment.*

3.   *The Statewide Technical Architecture was created at the direction of the IRMC. During its operation, the IRMC reviewed numerous technical solutions proposed by the State and by vendors with regard to STA compliance.*

4.   *The IRMC employed a committee structure. One of the committees was referred to as the TAPCC (Technical Architecture and Project Certification Committee). STA, Roles and Responsibilities, pp. 4-5 (function of TAPCC).   IT procurements exceeding $500,000 were regarded as "projects," and required approval of the TAPCC before being presented to the full*

IRMC for approval. IRMC project certification was directed by its policies, and these policies require the ITS Division of Enterprise Technology Strategies (ETS) to review bidders' technical architecture solutions as projects are implemented. Id., p. 5; IRMC policies and procedures. MMIS+ was presented to the TAPCC for certification of the implementation phase at the 30 June 2004 meeting. TAPCC meeting minutes, 30 June 2004. The TAPCC approved the certification request, indicating approval of the technical architecture of ACS' proposed solution. Id. This approval allowed the MMIS+ project to proceed, and the meeting minutes indicate that IRMC certification review would occur after completion of the approved implementation phase. Id. This is consistent with the STA Roles and Responsibilities.

5.   Under IRMC policies and procedures, approval of a bidder's proposed technical architecture was not required at the time of contract award. These policies and procedures provide for STA review and certification of proposed architecture solutions by ETS after award, and as part of the implementation process for IT projects certified by the IRMC. STA Roles and Responsibilities, pp. 4-7; IRMC MMIS+ Project Certification of 6 July 2004; Minutes of the last IRMC meeting on 7 July 2004.[1] This 6 July 2004 project certification document also states that the agency (DHHS) must comply with the Chief Technology Officer's (CTO, Michael Fenton) STA recommendation letter dated 17 June 2004.

IT Project development and implementation includes multiple reviews for compliance with the STA. See Finding 1, IRMC project certification policies and procedures.

6.   The IRMC reviewed and approved the technical planning of the RFP. It also unanimously approved the award of the contract and the technical solution. The MMIS+ project had three phases (Planning, Procurement and Implementation). Phase I, Planning, was certified by the IRMC on 8 August 2003. This led to the RFP. Phase II, Procurement, was certified on 2 December 2003, and completed on 8 April 2004. See Finding 1, IRMC archive, minutes of 12/2/2003, 8/8/2003.

7.   The STA was adopted by the IRMC pursuant to GS 147-33.78(b) (2003) "Powers and Duties.[2] The Commission had the following relevant powers and duties:

(5) To issue certification of any State agency information technology project that requires or is expected to require the expenditure of funds in excess of five hundred thousand dollars ($ 500,000), . . . The certification shall be issued when the Commission determines that the project complies with Commission policies, standards, and procedures. . . . No State agency, other than The University of North Carolina or any of its constituent institutions, shall allocate or expend funds in excess of five hundred thousand dollars ($ 500,000) on any information technology project without prior certification as required by this subsection. If an agency cannot determine whether a project or series of projects will require certification, the agency shall seek an opinion from the Commission. Upon review, the Commission may determine that a project is exempt from certification and shall advise the agency of its determination.

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[1] These minutes were not approved before the IRMC was dissolved by SL 2004-129.
[2] This authority was transferred to the State CIO by SL 2004-129; see N.C.G.S. §147-33.72C (2004)

(9) To develop and promote technical requirements for the fair and competitive procurement of information technology in cooperation with the Office of Information Technology Services where different information technology hardware, software, and networks operate together easily and reliably, while considering the cost-effectiveness of managing these assets."

8. *In December 1996, the IRMC approved the Statewide Technical Architecture Strategy developed by ETS, formerly known as the Information Resource Management (IRM) Office. The IRM Office developed the detailed technical architecture documents. By September 1997, all of the initial components of the Statewide Technical Architecture (STA) had been developed and approved by the IRMC. STA, Roles and Responsibilities, p. 2. Ms. Schmidt authored STA Standard 2.01.03. Schmidt Dep. p. 61. This Standard was primarily written for new development by agencies, or new systems developed for the State by an outside party. Id. p. 120.*

9. *The STA was developed based upon templates and work products of recognized industry experts in technical architecture. Schmidt Dep. pp. 57-62. One such expert was Larry DeBoever. Id. p. 57. Mr. DeBoever's work provided a foundation for STA chapters on Conceptual Architecture, the framework diagram and some of the principles and practices. Id.*

10. Proposed Finding 1: Through a series of contracts over the past twenty-seven (27) years, the State of North Carolina has contracted the Fiscal Agent duties of the State's Medicaid Program, including the operation of its federally certified Medicaid Management Information System (MMIS) to an outside entity.

11. *An RFP to replace the existing MMIS system was released in 1995. Sligh Dep. Vol. I, p. 92. Bid prices exceeded the available funding and that RFP was cancelled. Prior to issuing the RFP in Sept. 2003, the MMIS+ project team released a Request for Information (RFI). Sligh Dep. Vol. I, pp. 110, 157-158, Vol. II p. 33. The RFI was used to solicit information from the potential bidder community relating to formulation of an MMIS system that would meet North Carolina's needs and satisfy the federal Center for Medicaid Services (CMS), thereby providing additional assurance that funding would be available. EDS and Unisys submitted responses to the RFI. Letter of P. Peruzzi to E. Grasser, HHS, dated 8/1/00.*

12. *The Statewide Technical Architecture (STA) includes nine Domains grouped as a collection of Principles, Practices and Standards; eight of these Domains are addressed in a collection of Implementation Guidelines and in a collection of White Papers that provide general information; a Lexicon, and other sections including assorted ancillary documents. The three major sections (Principles, Practices and Standards, Implementation Guidelines and White Papers) present information relating to the same eight technical architecture Domains. These are: Application Architecture Technology, Data Architecture Technology, Enterprise Management Technology, Groupware Architecture Technology, Network Architecture Technology, Platform Architecture Technology, Security Architecture Technology, and System Integration Architecture Technology. The Principles, Practices and Standards section presents an additional Domain addressing Conceptual Architecture. See Finding 1, http://www.ncsta.gov/*

One of the additional documents, included in the Architecture Processes section, is entitled Roles and Responsibilities. This document describes the role of Enterprise Technology Services[3] (ETS) and provides relevant information to the MMIS+ technical evaluation performed by Mr. Mark Griffith (of the ETS staff), Mr. Robert (Bob) Veranes and Mr. Siew Thong as members of the MMIS+ Technical Architecture Committee ("TAC").

13. *ETS is the custodian, manager, analyst, and primary developer of the STA. ETS, through the leadership of the State CTO, maintains a staff that includes Enterprise Technical Architects who possess extensive experience in enterprise-wide technical architecture development and application. STA Roles and Responsibilities, p. 3. A proper understanding of the purpose, background and environment of the STA is crucial in applying its provisions. The STA must be interpreted from the standpoint of enterprise applications. It provides relevant technical guidelines and usages to enable a developer of new software for the State to implement proper design and programming of that software to promote efficiency and conformity to required business processes. Application Architecture is independent of any specific technology; implementation can be performed with multiple development tools in different computer languages and on different computing platforms. STA Application Architecture Overview, p. 16. There is no "one size fits all" tool set that addresses the needs of all applications or that can be implemented on a statewide basis. Id., p. 18. Hence, the STA is a dynamic technical instrument and requires knowledge and expertise in technical architecture and Information Technologies (IT) to properly interpret it. Accord, Fenton Aff., ¶8.*

14. *The word "application" is used, in e.g., STA Principle 2.00.04 ("Applications should be built by assembling and integrating existing components…") to mean an "enterprise software system." Applications should be designed to mimic the business process that they support; applications should respond to business events by responding to "business rules." STA Application Architecture 2.00.01. These "business rules" support the processes that the agency's business follows, they are parts of the business process that computer applications automate; e.g. business rules define what must be done and how it must be done. Application Architecture Overview, pp. 6, 12, 16. Applications operating as 3-tier or N-tier architectures use small programming modules known as "components." It is desirable to have components implementing single, or small sets of business rules. STA Application Architecture 2.05.08. Components are computer-programming modules supporting a single business function or rule. STA Application Architecture Overview, p. 16. In an N-tier architecture, applications comprise discrete units of functionality that IT professionals refer to as "services." These services implement small sets of related business rules or functions.*

15. *"An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it." N.C.G.S. § 150B-41. As such, deference should be given to an Agency within its expertise as to the interpretation of its rules and policies, such as the STA, in a contested case. The STA is a collection of technical standards, best practices, rationales, and goals, and these are interpreted and applied by agencies. These are divided into Domains, and the Domains are addressed in several sections of the STA. See, Finding 12. The*

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[3] ETS is an operational section of the Office of Information Technology Services (ITS).

purpose of the STA is misstated by Petitioners' reference to G.S. §147-33.95(b)(3) (2003);[4] which is fully stated as: "(b) [ITS] shall have the authority and responsibility, subject to the provisions of this Part, to: (3) Comply with the State government-wide technical architecture, as required by the IRMC."

16. *RFP §6.1, at page 694, provides the basis for determining responsiveness of a bid with regard to the evaluation of mandatory requirements. Therein, it states that bidders who properly complete the proposal submission requirements checklist and the mandatory requirements form shall be deemed responsive. DHHS contracted with Maximus, an independent company with national experience in MMIS systems, to conduct an initial bid review as described in the PEP. Sligh Aff., ¶5 (12/17/04); PEP pp. 8, 11 of 25. Maximus reviewed the proposal submission requirements checklist and the mandatory requirements, and concluded that all three proposals were in compliance; all bidders were found responsive. Johnston Aff., ¶¶3,4; Recommendation for Award, p. 11.*

17. Proposed Finding 2: On September 5, 2003, DHHS issued an RFP soliciting proposals for "replacement of the certified NCMMIS+, with the provision for ongoing maintenance and modification of a certified system with newer technology that emphasizes more efficient and effective processing." NCMMIS+ Initiative Selection Committee Summary Report and Recommendation for Award ("Recommendation for Award") at 3; *Ham Dep. p. 47.* The procurement was required to be a "best value" procurement under North Carolina law. N.C. Gen. Stat. § 147.3395(b)(1) (2004)*§147-33.95* (stating that ITS procurements are governed by best value standards), *§143-135.9*; 09 NCAC 06B.0301 (same). *The Centers for Medicare and Medicaid Services (CMS) mandated that the MMIS legacy system be replaced through an open and competitive bid process. Sligh Dep. pp. 83-84; IRMC project assessment, 7 Oct. 2003. 17 January 2003 Triangle Business Journal report and quotation from HHS spokeswoman, as cited in Petitioner's protest materials, p. 31.*

18. Proposed Finding 3: On December 10, 2003, DHHS received proposals from three bidders: EDS, ACS, and Unisys Corporation (Unisys).

19. Proposed Finding 4: Section 4.1 of the RFP required that proposed solutions conform to North Carolina Statewide Technical Architecture ("STA"):

> The State requires a new, technologically advanced system and operational solution that supports the State's requirements detailed throughout RFP Section 4. The solution shall conform to North Carolina's Statewide Technical Architecture Standards as identified on http://ets.state.nc.us/NCSTA/ets_index.html, the Web site for the State's Enterprise Technology Strategies, formerly known as Information Resource Management.

20. Proposed Finding 5: *Bidders were required to supply three templates illustrating their proposed system design, and these templates were for the purpose of assessing their proposed*

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[4] This statute has been amended by SL 2004-129, but referred to the IRMC at the time of the MMIS+ RFP, evaluation, contract award and project certification.

systems' compliance with the STA. The templates are part of the standard IT project assessment and approval processes established by the IRMC. See Finding 1, IRMC Certification process; DeVos Dep. pp. 22, 65. ACS' Logical System Design document (DeVos Dep. Exh. 14) identifies the architecture of its proposed solution and the subsystems of the solution. Id. pp. 77-78. ~~Immediately following~~*Following* the requirement that the operational solution "shall conform to North Carolina's Statewide Technical Architecture Standards," RFP Section 4.1 ~~also specifically stated that~~*further states*:

> The NCMMIS+ Replacement System shall support the following NCMMIS+ multi-payer functions:
>
>> Recipient Subsystem,
>> Eligibility Verification Subsystem (EVS),
>> Automated Voice Response Subsystem (AVRS),
>> Provider Subsystem,
>> Reference Subsystem,
>> Prior Approval Function,
>> Claims Processing Subsystem,
>> Managed Care Subsystem,
>> Health Check Subsystem,
>> Drug Rebate Subsystem,
>> Third-Party Liability Subsystem,
>> Management and Administrative Reporting Subsystem (MARS), and
>> Financial Management and Accounting Subsystem.
>> Information Systems and Services
>> Integrated Test Facilities
>> NCMMIS+ Interfaces

21. Proposed Finding 6: ~~Compliance with the Statewide Technical Architecture was a mandatory requirement of the RFP. No exceptions to this requirement are identified by the RFP. Moreover,~~ State agencies are required to adhere to the Statewide Technical Architecture "when designing, purchasing, upgrading, or enhancing information technology." STA, <u>Roles and Responsibilities</u>, at 5. *It is important to determine compliance with the STA as early in the design, purchase, or implementation process as possible. When early determination is not possible, processes are in place to verify compliance at later stages of technology deployment. Compliance overall is determined through the following mechanisms: ETS architectural review during the project certification process; Statewide IT Procurement seeks input from the ETS Office on agency technology purchases; and Statewide Technical Architecture maturity audits." STA, Roles and Responsibilities, Enforcement, at 5.* All information technology ("IT") projects in State Government must obtain the approval of ITS[5] Sligh Aff. ¶11 *(12/22/04)*, and IT procurements are conducted under the auspices of ITS. *ITS approval is contingent upon ITS' determination that an agency's IT project is consistent with the State's IT strategy, which is implemented through the State Technical Architecture. Id. ¶12.*

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[5] This is accurate as of the date of Ms. Sligh's affidavit. Prior to the effective date of SL 2004-129, the IRMC had IT project approval jurisdiction.

Justification: The first sentence is redundant with Finding #4, and therefore unnecessary. The second sentence, while apparently true, is not relevant to the issues for decision.

22. Proposed Finding 7: Standard 2.01.03[6] of the Statewide Technical Architecture *addresses newly developed computer programming applications developed by or for the State, indicating that*requires new applications acquired by the State to be "3-tier or N-tier" *application architecture is the standard for such applications*. "3-tier" application architecture means the logical separation of the user interface, business rules, and data access code of an application. Griffith Aff., ¶23. This division "allows for simple, straightforward additions to each of the three tiers without undue impacts on the others." *STA Application Architecture,* Standard 2.01.03, Rationale. Thus, "all new agency applications should be developed using 3-tier or N-tier architecture in order to maximize flexibility and scalability." *Application Architecture* Standard 2.01.03, Rationale. *Petitioner's argument that all IT systems acquired by the State must be 3-tiered is not correct. Standard 2.01.03, relating to enterprise applications, states as follows: Application - Designing and Developing Applications*

Standard 2.01.03 Develop 3-tier or N-tier Applications.

Rationale:

- *All new agency applications should be developed using 3-tier or N-tier architecture in order to maximize flexibility and scalability.*

- *The logical separation of the tiers for: user interface(s); business rules; and data access code allows for simple, straightforward additions to each of the three tiers without undue impacts on the others.*

- *The logical separation of the tiers also allows for changing the platforms where the tiers are deployed, resulting in a high degree of scalability. As transaction loads, response times, or throughputs change, a tier can be moved from the platform on which it executes to another, more powerful platform - or be spread over multiple machines - without impacting the other tiers.*

- *While many of the problems inherent in the state's existing monolithic and two-tier applications can be overcome by implementing applications with a three-tier architecture, the goal should always be true, N-tier applications.*

- *Large, complex projects that have high usage volumes and/or long life spans will be better served by an N-tier service oriented architecture.*

Justification: STA 2.01.03 is not correctly quoted, and refers to "applications."

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[6] This Standard is referred to throughout depositions found in the record as 2.01.02 and it appears in the unofficial un-chaptered version of the STA as 2.01.02, but in the official STA adopted by the IRMC, the Standard appears as 2.01.03. Henceforth, this section will be referred to properly as Standard 2.01.03.

23. Proposed Finding 8: A "draft" position paper *was posted to the STA website by ETS* staff on or about March 1, 2004. ~~"[T]he proper separation of an application's presentation logic, business logic, and data is a fundamental principle that~~ must ~~be followed. . . . Separation of these applications components is~~ required ~~by the current principles, practices, and standards specified in the North Carolina Statewide Technical Architecture." (emphasis added). No position papers contrary to this statement have been introduced by the State.~~ *The draft position paper was posted as a "Request For Comment." The paper has not been approved by ITS, the paper does not express the official position of ITS; and the paper is being revised in response to comments received during the comment period. Fenton Aff., 9-10. Review of IRMC meeting records reveals that this draft was not approved by the IRMC prior to its dissolution by SL 2004-129 or subsequently by the undersigned as CIO. This draft is not consistent with the text or interpretation of Application Architecture Standard 2.01.03.*

24. Proposed Finding 9: ~~A~~*The following* vendor question was asked prior to the deadline for submitting proposals*: "Is it acceptable to bid the current NCMMIS+ with enhancements to meet the RFP requirements as the replacement system?" The State responded "No." Exhibit 42, Vendor Questions to DHHS #9.* ~~regarding whether the State's current and older COBOL language-based MMIS system complied with the Statewide Technical Architecture. The State's answer was "no."~~ *The vendor did not ask, and the State did not answer, whether the use of COBOL conforms with the STA. See, Petitioner's Reply Brief (12/28/04), Exh. 9, pp. 3-4; see also, ACS' Memorandum (12/22/04), Exh. 3, pp. 3-4. The STA does not prohibit the use of COBOL. Griffith Dep. p 118, Veranes Dep. p 79.*

Justification: The Finding is restated to fully and correctly state the question posed and the State's response in substitution of the paraphrasing used in the proposed finding.

25. Proposed Finding 10: The RFP did not have any exceptions to the requirement that proposals "shall conform" to the Statewide Technical Architecture. In other RFPs, the State at times has limited the mandatory application of the Statewide Technical Architecture. In early 2004, DHHS let an RFP for a statewide Immunization Registry which states that the project "does not fully conform to the STA." For bug fixes and basic maintenance, the current programming language and approach can remain the same. For other changes and enhancements the Vendor must be in conformance to the STA. . . . " RFP No. 30-DIRM-170-04, at 31 (emphasis added).

Justification: Respondents' exception as to the materiality of this Finding is accepted. Therefore, while true, the Finding is not material to the issues presented for decision.

26. Proposed Finding 11: In a draft report evaluating the technical architecture of the ACS proposal, dated February 11, 2004, the State's own reviewers ~~reiterated~~*stated* that "the Statewide Technical Architecture (Standard ~~2.01.02~~*2.01.03*) requires that applications be developed using a 3-tier or N-tier architecture." The report further stated that "the following application systems do not satisfy the STA architecture standard," citing three components of the ACS solution: DRAMS, OmniTrack, and the Claims Adjudication System ("CAS"). *The TAC was satisfied that ACS' Claims Adjudication System was 3-tier. Griffith Aff., ¶28, Thong Aff., ¶22-23, Veranes Aff., ¶21-22.*

Justification: Use of "reiterated" implies that a prior statement or conclusion had been made. The report identified was represented in deposition testimony as the first such report.

27. *The STA addresses use of programming components in several sections and Domains. Components are simply parts of an application, much as rooms, floors, hallways, elevator shafts, etc. are parts of an office building. STA Principle 2.04.08 directs agencies to purchase, rather than develop or build, components. Applications should be designed to follow the logic of the business processes they support. STA Application Architecture Overview, p. 4. Business processes drive technical architectures. STA Conceptual Architecture, Principle 7, p. 9. Just as an architect's conceptual renderings for an office tower give direction and form to engineering details for constructing the tower infrastructure, Agency business processes drive the technical architecture of their IT environments, and, in turn, the technical architecture drives the selection and interaction of the IT infrastructure as IT projects are implemented.*

28. *STA Application Domain Std. 2.01.03 states that all new applications should be developed using 3 or N-tier architecture. This Standard applies to applications that are developed by or for the State, and that are enterprise applications. OmniCaid, the ACS proposed MMIS application, is an enterprise application because it both utilizes and provides business processes across several operational areas of DHHS. Application architecture is not required to be 3-tier or N-tier, as indicated by use of "should." This is consistent with STA Application Implementation Guideline 1, which states that "large complex projects . . . will be better served by implementing applications with a three tier architecture having access to an N-tier service oriented architecture." ACS' VP of Technical Architecture, Frank DeVos, apparently understood this from reading the STA. DeVos Dep. pp. 87-89, 98-99. Mr. DeVos presented ACS' OmniCaid application to the TAC by using the STA Domains during his oral presentation. Id. p. 95.*

29. *Components for support are often purchased as packaged software and integrated with the operating system or application; these may include printing, faxing and imaging. STA, Application Architecture Overview, p. 28. Such services should not be a concern for application developers; they should exist and be used as components of the system architecture just as a keyboard is a component of a personal computer. Id. EDS argues that the TAC "lowered" review standards for ACS by determining that inclusion of 2-tier components (DRAMS, OmniTrack, Pharmacy POS) means that ACS' system was 2-tier, and that the TAC approved a 2-tier system as compliant with the STA. See Brief of EDS in Support of Proposed Decision of Judge Morrison, pp. 6-8, 26. EDS' Brief misuses the term "system" in this argument; as system refers to the entire application or entire solution offered and the 2-tier components are simply elements of the system. See Findings 31-35 below.*

30. Proposed Finding 12: As to DRAMS and OmniTrack, the February 11 report ~~concluded~~ *stated* that these components of the ACS proposal were "2-tier" systems and that "[t]he business rules, in this configuration, must reside in the presentation and/or data tiers, both are which are not consistent with the North Carolina STA." As to CAS, the report ~~concluded~~*stated* that this system had mainframe applications with a "monolithic design" which "typically possesses intertwined presentation, business, and data access logic."

Justification. Because the February 11 report was a draft, use of "concluded" belies the further deposition testimony of TCA members that the report was developed through an iterative process that included tentative findings.

31. Proposed Finding 13: *ACS' OmniCaid application includes a component, or subsystem, identified as*~~The~~ DRAMS. *This* component ~~of the ACS proposal was intended to~~ provide*s* the drug rebate functionality required by the RFP. ~~Because the federal government, through Medicaid, is a large purchaser of prescription drugs, it is able to negotiate s~~Substantial discounts ~~with~~ *from* pharmaceutical manufacturers *are available for Medicaid supported pharmaceutical purchases*. These discounts take the form of rebates, and are administered by each individual state Medicaid Program. Between 1998 and 2002, North Carolina recovered over $700 million through its drug rebate program. Section 4.1 of the RFP specifically identified the functionality of the "Drug Rebate Subsystem" as part of the new NCMMIS system.

32. ACS' Logical System Design states that DRAMS is a multi-purpose drug rebate system that . . . support(s) OBRA, supplemental and commercial style rebate programs for Medicaid and other healthcare programs. Technologies and platforms include: Windows and Oracle. Logical System Design, p. 11-12. DRAMS is a 2-tier subsystem of the ACS OmniCaid application. DeVos Dep. pp. 79-80. Although this description implies that DRAMS executes substantial business logic (e.g. comparing names or lists of drugs, selecting or matching such names or lists with rebates), it is described as a reporting tool. DeVos Dep. pp. 85, 99; Logical System Design, p. 12-13. DRAMS was not developed for the State. DeVos Dep. p. 92, Loquai Dep. pp. 11-12. DRAMS is not an enterprise application because it does not share or leverage business logic with other applications. Schmidt Dep. pp. 124-125.

33. *The STA does not require ACS' proposed subsystem identified as DRAMS to be 3-tiered or N-tiered. As a component of ACS' OmniCaid application, DRAMS is not subject to Application Architecture Standard 2.01.03. DRAMS is a service rather than a product or application. This is because it is a stand-alone, commercial-off-the-shelf drug rebate product that is used by approximately 17 States; it is used by only a small number of State employees; it is used only four times a year; it contains few business rules, which change infrequently; it is a reporting component that does not involve intensive user interactions; it is ancillary to the core function of the MMIS system; Griffith Aff., ¶¶42, 47; Thong Aff., ¶¶38, 43; Veranes Aff.,¶¶ 23, 37, 42. DRAMS used PowerBuilder and included some business logic. DeVos Dep. pp. 77-78. DRAMS has been implemented in multiple states, and for NCMMIS+ will be is used by a small number of people, perhaps 50, to perform a specific task. DeVos Dep. pp. 99-101.*

34. Proposed Finding 14: The OmniTrack component of the ACS proposal ~~was intended to~~ track*s* ~~all~~ interactions ~~and correspondence~~ between service providers (*e.g.*, doctors, hospitals, *etc.*) and the NCMMIS system. *This subsystem supports the interactions between Fiscal Agent staff and providers by accessing and providing data on a simple screen display. OmniTrack is consistent with the 3/N-tier Standards and Best Practices of the Statewide Technical Architecture because it is a component of, and supports, the OmniCaid application. OmniTrack is an allows the users to invoke calls to other subsystems for data needed in the call center; e.g. allows users to request data, such as a date, a letter, etc. and the OmniTrack component then directs a request to another system component that responds to the request, resulting in the requested data*

appearing on the user's screen. Griffith Aff., ¶¶43, 47; Thong Aff., ¶39; Veranes Aff., ¶38.
ACS's proposal described OmniTrack as "the centerpiece of the provider Customer Service Center." *ACS's proposal described OmniTrack in §G.6 (Provider Subsystem), at p.11. as follows:*

> *OmniTrack . . . is available both as a browser-based, secure application and as a client/server platform that is most often used by Fiscal Agent staff. OmniTrack is the centerpiece of the provider Customer Service Center, providing a comprehensive, electronic repository of all interactions (inbound and outbound) for providers. OmniTrack is fully integrated with all components of the NCMMIS+ Customer Service component (including the Enterprise Document Management System) and the Claims Administration and DFS component . . . Fiscal agent staff have convenient access to a complete interaction history for providers including all phone calls, letters, email, fax, and Web portal inquiries initiated by the provider, any responses provided and any notices generated from the Claims Administration or DFS system. . . . OmniTrack is also fully integrated with the phone system and uses Computer Telephone Integration to support "screen pop" functionality. This speeds Fiscal Agent staff responses by pre-populating the interaction record with all core information from the provider, minimizing data entry requirements.*

Justification: The single sentence quoted in the proposed order does not provide a complete context for the OmniTrack subsystem. It is essentially a call center application that captures small amounts of information through screen edits ("screen pops").

35. *OmniTrack supports functionality of the "Provider Subsystem" as identified in §4.1 of the RFP, but is not involved in adjudication of claims. It is a "fairly minor little system . . . it is nothing more than the contact management system . . . for the call center, it just captures data." DeVos Dep. pp. 51, 86, 130-131. OmniTrack takes advantage of the N-tier architecture and invokes functions of other systems. Id, pp. 113-114. It does not adjudicate claims. Id, p. 129. Components, like OmniTrack, that allow users to obtain information and data from other subsystems or resources facilitate reuse of computer code, and reflect the preferred method of code reuse. STA, Application Architecture Overview, p. 27. Reuse of code is one of the principles of N-tier Architecture. STA, Standard 2.01.03. OmniTrack is a help desk that is internal to the purchasing agency, and it is a service rather than a product or application. As a service, it is not subject to the enterprise architecture standards. Schmidt Dep. pp. 106, 125-127, 133, 136-137. OmniTrack is not an enterprise application because it does not share or leverage business logic with other applications. Schmidt Dep. pp. 124-125. OmniTrack was not developed for the State. DeVos Dep. p. 92. It has been implemented for multiple ACS customers. Id. pp. 90, 92. ACS developed OmniTrack in the 1990's. Loquai Dep. pp. 11-12.*

36. Proposed Finding 15: Each of the bidders gave an oral presentation to the ~~State~~*Technical Architecture Committee* regarding the technical architecture of its proposed solution. ACS's oral presentation was *made* on February 16, 2004.

37. Proposed Finding 16: Section 1.6 of the RFP ("Oral Presentation") stated that in the event oral presentations were held, the "presentation proceedings shall be tape recorded." The purpose of the presentations was to "to provide an opportunity for the Offeror to clarify its

Proposal. Original submissions shall not be supplemented, changed, or corrected in any way." The oral presentations made by EDS, ACS, and Unisys were not tape recorded by the State. *Applicable procurement Rules permit clarifications, and do not require that clarifications be made in written form. 9 NCAC 06A.0102 defines "clarification" to mean ". . . limited exchanges . . . that may occur after receipt of offer . . . Offerors may be given the opportunity to resolve minor clerical errors."   9 NCAC 06B.0307 applies this principle, stating "Where offers are submitted substantially in accordance with the solicitation document but are not entirely clear as to the intent or to some particular fact or where there are other ambiguities, the agency . . . may seek and accept clarifications or may open communications . . ."   Conclusions drawn from the proposed finding of fact cannot be supported in view of these Rules; e.g. Petitioner's argument would require a construction that the solicitation document modified, or voided, the aforementioned Rules. Clarifications consistent with this Rule were permitted by the Proposal Evaluation Plan (PEP). PEP, pg. 12.*

38. *Proposed Finding 17: The Selection Committee retained exclusive discretion to conduct oral presentations and site visits. Prior to requesting oral presentations, the Selection Committee and its technical advisors were to determine whether such presentations would assist in the Committee's completion of their evaluation. PEP, pp. 21-22.   The PEP stated that oral presentations would allow bidders to present an overview of their technical solution and that such presentations would be tape recorded. The PEP further provides that the Committee would complete a report of any oral presentations. The evaluation documents prepared by the Technical Architecture Committee include facts and information from the presentations made to the Committee by EDS, ACS, and Unisys.* ~~The Proposal Evaluation Plan ("PEP") developed by the State for the evaluation of Proposals required that if oral presentations were conducted, a written report be made substantiating what occurred at such proceedings. No written reports were created regarding the oral presentations made by EDS, ACS, and Unisys.~~

39. *No evidence has been offered that the Selection Committee requested, or held, oral presentations. The TAC updated and revised the draft evaluation report as the Committee learned more about each proposal from written clarifications and otherwise. Griffith Aff., ¶¶45, 48-50, Dep., pp. 183-184; Thong Aff., ¶¶41, 44-46, Dep., pp. 130-131; Veranes Aff. ¶¶40-43-45, Dep., pp. 98-100. All three bidders met with the TAC to clarify certain technical aspects of their proposals. These technical discussions were intended to enlighten the TAC regarding questions of the Committee. Thong Dep. pp. 114-115, 141-143. The purpose of the meeting with ACS was to gather more information relating to the committee's question of whether the core system was monolithic or 3-tier. Thong Aff., ¶24. ACS' clarification letter of 23 January 2004 caused members of the TAC to reconsider their initial conclusions that ACS' proposed architecture met the 3-tier STA Standard. Griffith Aff., ¶29, Thong Aff., ¶24. ACS gave a PowerPoint presentation to clarify its MMIS+ system technical architecture. DeVos Dep. pp. 44-45, 50-53; DeVos Aff., ¶¶7, 8.*

Justification: The basis for the TAC's reconsideration, and questions at the oral presentation, arose because CICS can be used in a manner that commingles business rules and presentation layer programming. See Respondent's Written Arguments, pp. 8-11 and affidavits cited.

40. Proposed Finding 18: ITS Procurement *Policies and Procedures* 4.0 *states* that clarifications *must be* made *in writing and cannot be used to cure proposal deficiencies or omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. These policies and procedures do not supersede the Administrative Rules found at 9 NCAC 06A and 06B. Under the North Carolina Administrative Procedure Act, "regulations" are called "rules." N.C. Gen. Stat. § 150B-2(8a). Furthermore, ITS has not adopted ITP-4.0 as a rule pursuant to the provisions of Article 2A of Chapter 150B of the General Statutes. This ITS Procurement Policy and Procedures document is neither a promulgated rule, nor a regulation, and lacks the force of law.* <u>Dillingham v. N.C. Dept. of Human Resources</u>, 132 N.C. App. 704, 513 S.E.2d 823 (1999). ~~There is no written substantiation of any clarifications ACS may or may not have made at its oral presentation to the State.~~ One of the reviewer's handwritten notes from the ACS oral presentation indicate that ACS did make a "CHG FROM PROPOSAL," *indicating that ACS did make a change to a diagram, although* the specifics of that change were not *included in said notes. This change from the proposal simply corrected an error, because the software tool shown in the original diagram, PowerBuilder, had been replaced by ACS. Mr. Griffith explained that he referred to a change from "provider and recipient to web logic, state user to EA server" relating to replacement of PowerBuilder. Griffith Dep. pp. 202-203; Griffith Aff., ¶13. Such changes are permitted by 9 NCAC 06B.0307 as error corrections. See Finding 37. ACS noted this change in response to a written clarification question, wherein ACS indicated that PowerBuilder had been replaced in the middle tier and that the Windows client was written in PowerBuilder. Griffith Aff., ¶¶19-20, 51-55. EDS noted a similar change in its written clarification responses, by replacing a PowerBuilder user interface then in use in its MMIS system operating in Okalahoma as that system was proposed for implementation in North Carolina. See, EDS clarification questions letter of 12/16/2003 included as Exhibit 41 to ACS' Written Argument submitted pursuant to N.C.G.S. §150B-40(e). See also, 9 NCAC 06A.0102 (3) and (4) for definitions of "clarification" and "communication." This process, particularly in a complicated project such as MMIS, provides a means and opportunity for technical personnel to understand more completely exactly what a vendor is proposing—without changing the proposal.*

41. Proposed Finding 19: The final report reviewing the technical architecture of the ACS proposal was completed on March 3, 2004.

42. Proposed Finding 20: This final report concluded that the DRAMS and OmniTrack components of the ACS proposed solution, as well as the Pharmacy POS system, were of "2 tier design" and were "not consistent with the NCSTA." The State ~~concedes~~ agrees that the DRAMS and OmniTrack components are 2-tier subsystems *of the OmniCaid application. The Pharmacy POS system is, in fact, 3-Tiered. Veranes Dep. at 128, 134-35, 139; DeVos Dep. p. 80. The Record in this case shows that the reference to Pharmacy POS System in the quoted statement was an error. (Secretary's Response to EDS' Protest, p. 2). See, Dep. Exhibit 16, Griffith Dep., pp. 49, 52, 88, 239, 261; Dep. Exhibit 23, Veranes Dep., pp. 143-145, 147-148, 168; Dep. Exhibit 14, DeVos Dep., pp. 84-85, 99-100; Dep. Exhibit 19, Schmidt Dep., Vol. I, pp. 124-125; Dep. Exhibit 20, Singh Dep., pp. 91-94, 104-106; Dep. Exhibit 13, DeBoever Dep., pp. 57-58; Dep. Exhibit 22, Thong Dep., pp. 146, 148. See also, Findings 28-35 (regarding DRAMS and OmniTrack).*

43. Proposed Finding 21: The final report concluded that the CAS component of the ACS proposed solution was "n tier" in conformance with the Statewide Technical Architecture. This is a change from the February 11 draft report. The *TAC*~~State claims that the architecture review team~~ changed its conclusion ~~from~~ *after* ~~the prior draft based on information provided by~~ ACS' ~~during its~~ oral presentation. *The written evaluation reports and a PowerPoint presentation made by the TAC include facts and information presented by ACS to the Selection Committee.* ~~There was no report created describing that information.~~ *The draft evaluation reports were used as works in progress to collect the TAC members' thoughts and questions as they learned about each proposal. Griffith Dep., pp. 46-47, 164-165, 183-184; Veranes Dep., pp. 98-100; Thong Dep., pp. 35-36, 130-131. The TAC prepared a PowerPoint slide presentation detailing the proposals, and made this presentation to the Selection Committee. Griffith Dep. p. 226 and Dep. Exh. 26. The TAC reports reflected the information discovered during the presentations by the vendors in the Committee Score Sheets given to the Selection Committee. Affidavit of Mark Griffith, pp. 10-13.)*

44. Proposed Finding 22: The Recommendation for Award, which incorporated the findings of the ~~technical architecture reviewers~~*Technical Architecture Committee*, concluded that the EDS and Unisys proposals had "the essential characteristics of an N-tier design." ~~without exception. In contrast, t~~*T*he report found that ~~only~~ the "core solution" of the ACS proposal "has an n-tier design," and that the 3 subsystems identified above ~~(~~DRAMS, OmniTrack, and PharmacyPOS) "have a 2-tier design." Recommendation for Award at 18. The RFP does not define any particular part of the vendor's solutions as the "core solution." *However, the PharmacyPOS subsystem, known as PDCSx2, has an N-tier architecture. Veranes Dep. pp. 128, 135-139; See Finding 42.*

Justification: See Respondent's Written Argument at p. 29. Secretary Odum concluded that the PharmacyPOS was not 2-tier. Decision, p. 2, note 2. Mr. Griffith addressed a deposition question regarding PharmacyPOS with reference to the device used to capture information by means of a magnetic card reader. Griffith Dep. p. 215. Mr. Thong acknowledged some confusion as to PharmacyPOS and PDCSx2. Thong Dep. pp.145-146.

45. Proposed Finding 23: *The RFP, which incorporated multiple addenda providing answers to vendor questions, and the Recommendation for Award, which incorporated the findings of the TAC and the written clarification questions and responses, illustrate changes, additional information or corrections made by all of the bidders.* ~~Neither Unisys nor EDS were informed of the possibility or given an opportunity by reviewers to amend their proposals to offer components that did not comply with the 3-tier requirement of the Statewide Technical Architecture.~~

Justification: No evidence was offered to demonstrate what, or whether, any opportunity was afforded one vendor, but not to another, to materially change their bid. ACS, Unisys and EDS had an opportunity to read the materials on the ITS site, to obtain consultation (as did ACS) and to ask questions of ITS and the Agency (as all three did) about the ITS 3-tier and n-tier requirements before their RFP response was sent to the Agency. Petitioners make an argument to the conclusion stated in the proposed finding of fact, but arguments of counsel are not evidence. State v. Collins, 345 N.C. 170, 478 S.E.2d 191 (1996).

46. Proposed Finding 24: Based on the point scoring evaluation scheme developed by the State for evaluating proposals, ACS received the most points out of any of the bidders. EDS received the second highest total of points, followed by Unisys.

ADDITIONAL FINDINGS OF FACT

47. *The State's business needs drive the application and interpretation of the STA. STA, Application Architecture Principle 2.00.08; Schmidt Dep. pp. 113-114. The importance of 3-tier or N-tier architecture is to facilitate agency access to business rules; this relates to the State's service broker because it allows flexibility in implementing the architecture. Id. pp. 119-120. Ms. Schmidt further testified that ". . . the point is not whether something that's bid complies with the architecture; it is whether it meets the business need and then complies with the architecture." Id. p. 184.*

48. *The STA and the 3/N-tier architecture were put in place so that the State could leverage sharing across applications. Schmidt Dep. p. 111. This means that an analysis of the business problem must be made. Id. N-tier service, in the STA, refers to an architecture that allows multiple applications to share the service, because it facilitates a separation of business logic and not to the presentation layer or data access layer of an application. Id. pp. 77-80. An architecture that utilizes a 3-tier architecture, which componentizes one or more of the logical tiers is said to be N-tier. STA Lexicon p. 8. Componentization refers to the use of small modules that can be shared and reused, regardless of the programming language. Schmidt Dep. p. 164, Thong Aff. ¶¶19,20. Componentization has been used by the State in its COBOL programming. Schmidt Dep. p. 164. COBOL programming is acceptable under the STA so long as it is written in three tiers and the presentation layer is separated from it. Griffith Dep. p. 118.*

49. *Petitioner, Respondent and Intervenor offered deposition testimony and affidavits from individuals identified as experts. Petitioner offered Mr. Jeff Parmet as an expert in technical architecture. Mr. Parmet has programming experience, and software development experience, albeit thirty years ago. Parmet Dep. p. 109. Mr. Parmet has significant work experience relating to information technology management, and has worked for respected IT companies. Id. pp. 92, 97. His recent work experience as a consultant was allocated as approximately 90% in systems failures, 5% in software infringement and 5% in electronic discovery forensics. Id. pp. 32, 35. His work experience has not provided him with direct knowledge or training in relevant 3/N-tier technical architecture principles as applied in this matter. He admits that his is not qualified as an expert in enterprise architecture. Id. p. 187. Mr. Parmet did not offer a definition as to the meaning of 3-tier, Id. pp. 70-72. He did not offer a definition for 2-tier architecture, and stated that it generally refers to a client/server. Id. p. 139. Nor could he identify anyone considered a leader in matters of enterprise architecture. Id. pp. 131-2. Two such persons are Larry DeBoever, offered by Respondents as an expert witness, and John Zachman. He also acknowledged that the process methodology utilized by a former employer was not analogous to having a standardized technical architecture. Id. p. 97.*

Justification: John Zachman is a faculty fellow at the Information Systems Research Center at the University of Texas. He has written numerous articles over the past thirty years relating to IT technical architecture, IT strategies and related subjects and written or co-authored several books on these subjects. He is a member of the International Advisory Board of the Data

Administration Management Association, DAMA International; a member of the International Information Resource Management Advisory Council of Smithsonian Institution in Washington DC; and of the Board of Directors of the Depository/Architecture/Development Users Group.

For reference see Zachman Institute for Framework Advancement at www.zifa.com; and http://www.unt.edu/isrc/Faculty/FacultyFellows/zachman.htm.

Larry DeBoever was tendered by Respondents as an expert in technical architecture and his CV is attached to his Affidavit of 12/21/04. His deposition details his experience. See DeBoever Dep. pp. Mr. DeBoever's work formed the basis, in part, for the N.C. STA. See Findings 7-9. See also, Foroozesh, "Making of a Successful Technical Architecture." (www.inquest-corp/html/eta_article.html) and Direction of the NCAS Client/Server Technology, (www.osc.state.nc.us/sig_docs/sigDirection _of_the_NCAS_ClientServ.html)

Official notice of expertise of Larry DeBoever and John Zachman is based upon foregoing as permitted by N.C.G.S. §150B-41(d).

50. *Mr. Parmet's experience includes working with various Customer Relationship Management (CRM) products such as databases from Oracle, Siebel, and others. Parmet Dep. p. 88. He acknowledged that these are not thought of in terms of "tiers" and are not 3-tier products. Dep. pp. 88-89. And that the tiered structure is not a product concept, but rather a system architecture concept. Id. p. 92. Mr. Parmet illustrated this distinction by reference to Siebel's CRM product, indicating that the question of 3-tier or N-tier architecture would not be considered for the product, but only for the environment and that the question would be whether the product could run in a 3-tier or N-tier environment. Id. pp. 92-93. Mr. Parmet did, however, identify technical architecture as more of a concept that could include physical and logical designs, and acknowledged that the system owner's definition would be controlling. Id. pp. 70-72. In contrast to this view, Mr. Parmet testified that he sought and received no interpretation of the North Carolina State Technical Architecture, and relied only upon his experience and interpretation. Id. pp. 188-189. He further testified, contrary to his statements on Id. pp. 92-93, that the Statewide Technical Architecture applies to individual components such as OmniTrack and Drams just as it applies to the system as a whole. Id. p. 228.*

51. *Mr. Parmet had little knowledge and no direct experience with the Center for Medicare Services (CMS) or Medicare Information Technology Architecture Initiative (MITA). Parmet Dep. pp. 135-136.*

52. *Section 6 of the RFP addressed the method of evaluation. The PEP was developed by DHHS and approved by the Center for Medicaid Services (CMS). The evaluation procedure described in the RFP and PEP was complex; involving multiple committees of evaluators, evaluation of multiple aspects and issues presented in the bids, technical details supplied by bidders associated with their conceptual and logical MMIS+ system designs. The evaluation process employed by the RFP was consistent with Best Value procurement as described in N.C.G.S. §143-135.9 and the ITS procurement rules (9 NCAC 06A, 06B.)*

Justification: Petitioner argues that DHHS varied the evaluation criteria, that the STA was "relaxed" or that certain parts of the STA were "waived" and therefore, the basis for

evaluation was impermissibly changed because the alleged changes occurred either after bids were received or without providing bidders with notice and an opportunity to amend their bids. Petitioner cites cases arising under federal procurement law and rules, and a federal case involving a state procurement. Petitioner's cited authorities are inapposite.

In United Technologies Comm. Co. v. Washington Co. Bd, 624 F. Supp. 185 (D. Minn. 1985), cited by Petitioner, the court recognized the need for some subjectivity when a governmental agency selects sophisticated and expensive equipment, but was offended by the failure of the county's bid solicitation to provide any information to bidders about the scoring system to be used in analyzing bids. The complete absence of information about the scoring process led the court to find that an unsuccessful bidder seeking to enjoin the bid award was likely to succeed on the merits of its claim that the process was illegal. This case clearly contrasts to the N.C. MMIS+ procurement, wherein RFP §6, Evaluation Methodology, identifies elements of the desired solution, evaluation of the mandatory requirements (§6.1) and computation of scores and ranking of proposals (§6.3); e.g. the elements missing from the solicitation used in the United Tech. Comm. case.

53. *The RFP required bidders to provide an Integrated Test Facility (ITF). RFP §4.1.3.16 (pp. 266-267) describes the ITF requirements. A bidder submitted a clarification question as follows: "Does this (§4.1.3.16.3.1) indicate that the physical hardware and software supporting ITF must reside in Raleigh, N.C.?" This question was answered as follows: "The State has no restrictions on location of the hardware and software . . . the ITF function must reside in Raleigh, N.C." This was adopted as an amendment to the RFP as Addendum 5; see also RFP Addendum 8, Item 12. The ITF serves to provide an environment for testing as the project implementation moves forward. It necessarily requires physical space and resources, and the ability to carry out functions of the MMIS+ application to test the implementation. The RFP did not require bidders to locate the physical and functional aspects of the ITF in Raleigh. Johnston Aff., ¶7. ACS proposed to locate the equipment necessary for the ITF in their facility in Charlotte, N.C. and to locate their staff in Raleigh.*

54. *ACS proposed using CICS by having distinct and separate programming modules that CICS orchestrates to support the Claims Processing function. This effectively componentizes CICS. Hence, CICS acts as a service broker for distribution of user requests originating at the presentation layer to the COBOL based business rule components, and the presentation layer does not include CICS business rules. Griffith Aff., ¶¶45, 46, 49; Thong Aff., ¶45; Veranes Aff., ¶44. The COBOL programs do not contain embedded CICS programming for handling presentation layer logic. Thong Aff., ¶36; Thong Dep. p. 168; Griffith Aff., ¶40; Veranes Aff., 35. Hence, there is no commingling of presentation layer code with business code. Id.*

55. *EDS argues that the descriptions associated with the evaluation criteria and ordinal scale were impermissibly changed after delivery of the bids. EDS Protest Letter, pp. 24-29; EDS Written Argument submitted pursuant to N.C.G.S. §150B-40(e), p. 10. Mr. Griffith requested permission to modify the descriptions to make them more meaningful. Ms. Sligh discussed this with CMS and CMS agreed to the requested changes; but required that the meaning of the 0-10 ordinal rankings could not change. Sligh Aff., ¶18-19 (12/22/04). The amended narratives correspond to the original scale and meanings set forth in the PEP on pp. 15-16.*

CONCLUSIONS OF LAW

1. Proposed conclusion 1: This proceeding is governed by Article 3A of the Administrative Procedure Act. Homoly v. State Bd. of Dental Examiners, 121 N.C. App. 695, 699, 468 S.E.2d 481, 484 (1996) "[T]he contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely." review denied, 343 N.C. 306, 471 S.E.2d 71 (1996).

2. Proposed conclusion 2: *The decision in this matter must be made upon consideration of the record as a whole, as prepared by and cited by the Parties, together with such facts or information included by Official Notice. The decision must be supported by substantial evidence admissible under N.C.G.S. §150B-41. Substantial evidence means relevant evidence a reasonable mind might accept as adequate to support a conclusion. N.C.G.S. §150B-2(8b).* ~~To withstand the scrutiny of judicial review, the decision of an agency cannot be supported "if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:~~

> ~~(1) In violation of constitutional provisions;~~
> ~~(2) In excess of the statutory authority or jurisdiction of the agency;~~
> ~~(3) Made upon unlawful procedure;~~
> ~~(4) Affected by other error of law;~~
> ~~(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or~~
> ~~(6) Arbitrary, capricious, or an abuse of discretion."~~

~~N.C. Gen. Stat. § 150B-51(b); cf. N.C. Gen. Stat. § 150B-23(a) (pleading requirements for Article 3 proceedings).~~

Justification: The Proposed Conclusion is rejected because N.C.G.S. §150B-51(b) establishes the standard of review applied by a superior court when the court reviews a final agency decision. N.C.G.S. §150B-42 provides the evidentiary standard for this matter. The right of judicial review does not accrue until a final ruling from the agency. Empire Power Co. v. N.C. Dept. of Environment, Health and Nat. Resources, 337 N.C. 569, 447 S.E.2d 768 (1994).

3. Proposed conclusion 3: Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c); see also 09 NCAC 06B .1015 (granting the undersigned authority to recommend summary dispositions in this proceeding). *On a motion for summary judgment the court may consider the pleadings, depositions, answers to interrogatories, affidavits, admissions, oral testimony, documentary materials, facts that are subject to judicial notice, such presumptions as would be available upon trial, and any other material that would be admissible in evidence at trial. Koontz v. City of Winston-Salem, 280 N.C. 513, at 518, 186 S.E.2d 897 at 901 (1972).* In opposing a motion for summary judgment, the non-moving party may not rely on conclusory allegations unsupported by facts. Lowe v.

Bradford, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). Rather, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Id.

4. *Petitioners argue that affidavits offered by Respondents should not be considered. Petitioners cite two North Carolina cases in support, but fail to identify the courts' complete reasoning. On the argument of affidavits offered by a non-moving party to show that issues of material fact exist when responding to a motion for summary judgment, our courts have said:*

> *The question thus presented . . . is whether a party opposing a motion for summary judgment by filing an affidavit contradicting his prior sworn testimony has "set forth specific facts showing that there is a genuine issue for trial" as required by G.S. § 1A-1, Rule 56(e). We think a party should not be allowed to create an issue of fact in this manner and thus hold that contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion **where the only issue of fact raised by the affidavit is the credibility of the affiant**.*

Wachovia Mortgage Co. v. Autry-Baker Real Estate, Inc., 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978) (emphasis added), Phillips v. A Triangle Women's Health Clinic, 155 N.C. App. 372, 573 S.E.2d 600 (2002), Allstate Ins. Co. v. Lahoud, 605 S.E.2d 180; 2004 N.C. App. LEXIS 2149. See Findings 31-35, reciting additional explanatory information provided by the affidavits offered by Respondents. These affidavits clearly provide facts that add detail, but do not materially alter, deposition testimony of the affiants. Mr. Griffith's affidavit identifies several documents that were not presented during his deposition; hence his affidavit shows detail and information that may not have been available during his deposition. Griffith Aff., ¶28 For example, ACS' clarification letter was not used as an exhibit in Mr. Griffith's deposition, but he did rely upon it in making his affidavit. Id. ¶29.

When a non-moving party presents compelling undisputed evidence on an issue raised in the moving party's motion, summary judgment may be granted for the non-moving party. A-S-P Assoc. v. City of Raleigh, 38 N.C. App. 271, 247 S.E.2d 800 (1978), rev. on other grounds, 298 N.C. 207, 258 S.E.2d 444 (1979).

5. Proposed Conclusion 4: *The State must award contracts to responsible and responsive bidders. ITS procurement rules and N.C.G.S. §143-135.9 (the "Best Value" statute) control the procurement procedures for Information Technology procurements. The MMIS+ procurement was conducted as a Best Value "trade-off" procurement pursuant to N.C.G.S. §143-135.9 and 9 NCAC 06B.0302(i)(B).* ~~Under ITS regulations and the general precepts requiring fair competition in bidding, the State is not permitted to award a contract to a non-responsive bidder. 9 NCAC 06B.0302(1)(h). "Indeed, it is the duty of the public authorities to reject all bids that do not comply substantially with the terms of the proposal, for any other rule would destroy free competition." 64 Am. Jur. 2d Public Works and Contracts § 57 (2001). A disappointed bidder is prejudiced by the failure to reject a non-responsive bid if there was a substantial chance it would have received the contract award. See, e.g,. Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999); see also Professional Food Services Mgmt., Inc. v. N.C. Dep't of Admin., 109 N.C. App. 265, 270, 426 S.E.2d 447, 451 (1993) (bidder found to be prejudiced by improper rejection of conforming bid).~~

Justification: Petitioner's argument misstates the cited Administrative Rule and seeks to apply federal case law that is not applicable. Petitioner's Grounds for Protest presents a similar argument and relies upon Title 1 of the Administrative Code, and that is not applicable as it relates only to the Dept. of Administration, Division of Purchase and Contract.

6. *"An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it." N.C.G.S. § 150B-41. As such, deference should be given to an Agency within its expertise as to the interpretation of its rules and policies, such as the STA, in a contested case. The STA is a collection of technical standards, best practices, rationales, and goals, and these are interpreted and applied by agencies. These are divided into Domains, and the Domains are addressed in several sections of the STA. See, Finding 12. The purpose of the STA is misstated by Petitioners' reference to G.S. §147-33.95(b)(3) (2003); which is fully stated as: "(b) [ITS] shall have the authority and responsibility, subject to the provisions of this Part, to: (3) Comply with the State government-wide technical architecture, as required by the IRMC."*

7. *9 NCAC 06B.0302(1)(h), provides in full that, "[a]ward must be made to the responsive and responsible offeror whose offer is determined in writing to be the most advantageous to the state, using all evaluation factors set forth in the solicitation." Petitioner cites* Alfa Laval Separation, Inc. v. United States, *175 F.3d 1365, 1367 (Fed. Cir. 1999); this case is not relevant and the arguments based on this case are rejected. The term "responsible" refers not only to the attribute of trustworthiness but also to the quality, fitness and capacity of the bidder to perform the proposed agreement satisfactorily. 64 Am Jur 2d Pub Wks & Contracts §69. In Best Value procurements, "responsible" and "responsive" are addressed by construction of various Rules: definitions in 9 NCAC 06A (deficiency, weakness, total cost of ownership, best value), 9 NCAC 06B.0302(2) (trade-off evaluations); 9 NCAC 06B.0307 (Error/Clarification), and 9 NCAC 06B.0401 (Basis for Rejection).*

Professional Food Services Mgmt. v. N.C. Dept. of Admin. *109 N.C. App. 265, 426 S.E.2d 447 (1992) does not stand for the proposition that "[a] disappointed bidder is prejudiced by the failure to reject a non-responsive bid if there was a substantial chance it would have received the contract award" as argued by Petitioner. In this case, the court reversed the Department's determination that the petitioner-appellant's bid was non-responsive.*

Petitioner argues that 64 Am. Jur 2d Public Works & Contracts §57 provides authority, but fails to provide the complete reference; it states in full:

> *It is a general rule that the bid of one proposing to contract for the doing of a public work must, in order to secure the contract, respond or conform substantially to the advertised terms, plans, and specifications; otherwise, the board or official whose duty it is to award the contract may properly refuse to give the bid consideration. The questions of the responsiveness of a bid relate to its conformity with the invitation and are generally not curable after bid opening. **A bid is responsive if it promises to do what the bidding instructions require**. If a bid for a public construction contract complies with the specifications in all material respects and does not give a competitive advantage to one bidder over another the bid is considered responsive, notwithstanding the omission of an item called for by the specification. Indeed, it is the duty of the public authorities to*

reject all bids that do not comply substantially with the terms of the proposal, for any other rule would destroy free competition. A contract entered into on terms more favorable to the contractor than indicated by the advertised plans or specifications, or incorporating material changes in and additions to those plans and specifications, is void. The rule that a bid for a public improvement must conform substantially to the specifications in the proposal for bids has been enacted into statute in some states. (emphasis added)

The State has discretion to waive irregularities or requirements as to the form of bids, or defects in bids when such defects do not prejudice the rights of a bidder, but cannot waive defects that affect or destroy competitive bidding. 64 Am. Jur. 2d Public Works & Contracts §61.

A more accurate statement of the general procurement law relevant to agency discretion is found in 64 Am Jur 2d Pub Works & Contracts §67, which states in full:

Usually, however, the contract is not required to be awarded to the lowest bidder, without qualification, but is to be awarded to the "lowest responsible bidder," "lowest and best bidder," etc., and there is but little dissent from the general rule that in determining who is such "lowest responsible bidder," "lowest and best bidder," etc., public boards and officials are vested with wide discretion. Courts are generally reluctant to substitute their judgment for that of government officials in determining which party is the lowest responsible bidder on a government contract, and the presumption is that governmental officials have acted in a lawful manner. Their decision, when based upon an honest exercise of the discretion thus vested in them, will not be interfered with by the courts, even if erroneous. When courts must become involved, the standard of review in determining whether a governmental body has appropriately awarded a competitive bidder a public contract is whether the governmental body abused its discretion. Under this rule, public authorities may exercise discretion as to the quality of material or workmanship and its adaptability to the particular use or purpose desired; according to the prevailing view, public authorities are allowed to make a choice between different kinds of materials when, by the terms of the specifications, competition is open as to all kinds, provided of course that the choice must be reasonable and not fraudulent or arbitrary.

The foregoing general statements of procurement law illustrate the discretion and judgment afforded agencies when determining the responsiveness of a bidder and the agencies' discretion when determining whether bids substantially comply with the bid specifications. The Findings in this matter, recited above, show that Petitioner has failed to show that ACS' bid did not substantially comply with the State's Technical Architecture.

8. *Best Value procurements are conducted and evaluated to determine which offer, of those received, provides the most advantageous solution for the State by examining the "total cost of ownership." N.C.G.S. §143-135.9(a) states:*

"Best Value" procurement means the selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality

is considered an integral performance factor. The award decision is made based on multiple factors, including: total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance.

This method of selection can result in an award to a bidder whose price is higher than another bidder's, or as in the MMIS+ award, to a bidder whose technical solution is not rated as well as another bidder's. Evaluation criteria provided in the RFP illustrated the relative weightings of the criteria. See RFP §6.3, showing cost as 4,800 (30%) of the 16,000 available points.

9. Proposed Conclusion 5: Section 4.1 of the RFP ~~required~~ *stated* that the bidders' proposed solutions shall conform to the Statewide Technical Architecture. The ACS solution ~~did not comply~~*complies* with the 3-tier ~~requirement~~ *Standard and Best Practices* of the Statewide Technical Architecture. ~~It is undisputed that~~*The ACS components identified as* DRAMS and OmniTrack are 2-tier subsystems *of the OmniCaid application* and ~~simply do not comply~~*are not required to individually satisfy the 3-tier or N-tier Application Architecture Standard. Respondent submitted deposition testimony and affidavits of seven knowledgeable and expert witnesses supporting this conclusion; Petitioner's designated expert is not credible. See Findings 42, 49-50; See ACS' Memorandum In Opposition To The Proposed Decision Recommending Summary Judgment For Petitioner And In Support Of A Decision Affirming The Contract Award To ACS, p. 13 et. seq. Petitioner has not submitted credible evidence that ACS failed to comply with the Statewide Technical Architecture.*

10. Proposed Conclusion 6: ~~The State chose not to make any exceptions in the RFP to its own requirement that solutions shall conform to the Statewide Technical Architecture. Even if the RFP required construction on this point, it would be construed against the State as the drafter. WellPath Select, Inc. v. N.C. Teachers' and State Employees' Comprehensive Major Medical Plan, 2001 WL 34055817 (OAH 2001); Novacare Orthotics & Prosthetics East, Inc. v. Speelman, 137 N.C. App. 471, 528 S.E.2d 918 (2000) ("when an ambiguity is present in a written instrument, the court is to construe the ambiguity against the drafter — the party responsible for choosing the questionable language.").~~

Justification: Petitioner asserts that ambiguities in contracts should be construed against the drafter. This general principle is accepted as correct. Wood-Hopkins Cont. Co. v. N.C. State Ports Authority, 284 N.C. 732, 202 S.E.2d 473 (1974). This argument may support a finding that a term, or word, is ambiguous; however Petitioner has not presented any issues identifying any terms or words as ambiguous. Therefore, this conclusion is rejected.

11. Proposed Conclusion 7: *The State is permitted to exercise substantial discretion in the development of an RFP. The State must, as it suggests, exercise "professional judgment" after proposals are submitted to determine whether the bids satisfy the STA. Fenton Aff. ¶8. Section 4.1 of the RFP specifically identified the "Drug Rebate System" and "Provider Subsystem" as functions of the requested NCMMIS solution.*~~The State was permitted to exercise substantial~~

~~discretion in the development of the RFP. But the State cannot, as it suggests, exercise "professional judgment" after proposals are submitted to determine whether parts of the Statewide Technical Architecture do not need to be followed. [Fenton Aff. ¶ 8.]~~ *The STA is a technical design document that cannot be applied without the exercise of professional judgment. The STA Roles and Responsibilities document identifies the function of Enterprise Technology Services (ETS). ETS functions, in part, to assist agencies in determining how to apply the STA and whether vendor provided solutions conform to the STA. In the instant matter, this is illustrated by various witness examinations on the matter of using COBOL and CICS as the programming for ACS' OmniCaid application. Mr. DeVos, ACS' VP for Technical Architecture, acknowledged that someone might reasonably assume that use of COBOL and CICS would result in a monolithic application. DeVos Dep. p. 38. The TAC made this assumption as documented in their draft evaluation documents. Subsequent clarifications resolved this assumption to show that ACS' use of COBOL and CICS is componentized into modules. See Findings 39, 40. Mr. DeVos testified that ACS has a high degree of reuse in their COBOL modules. DeVos Dep. p. 38.* ~~In order to preserve the requirement of fair competition, bidders need to be informed prior to bid submission if their entire solution does not need to conform to RFP specifications. Otherwise, a level playing field cannot be maintained and the right of bidders to a fair competition is prejudiced. Here, for example,~~ Section 4.1 of the RFP specifically listed the "Drug Rebate System" and "Provider Subsystem" as a part of the requested NCMMIS solution, and required a "solution" that "shall conform" to the Statewide Technical Architecture.

12. Proposed Finding 8: ~~EDS was prejudiced under N.C. Gen. Stat. § 150B-51(b) because, as the highest rated proposal among the remaining two bidders, there was a substantial chance it would have received the contract award but for the failure of the State to disqualify the ACS proposal.~~

Justification: N.C. Gen. Stat. § 150B-51(b) does not establish the standard of review that must be applied by a final decision maker in an Article 3A contested case. See Conclusion 2. This conclusion, and Petitioner's argument, is premised upon the belief that the failure of the State to award a contract is prejudicial. Vendors do not have any right or interest in a contract with the State. 64 Am. Jur. 2d Pub Works & Contracts §87, §88.

13. Proposed Conclusion 9: ~~The State violated the RFP by failing to tape the vendor oral presentations pursuant to RFP § 1.6.~~

Justification: See Findings 37-39. The State was not required to record the meetings between the State's TAC (Mark Griffith, Bob Veranes, and Siew Thong) and the vendors because the meetings were permitted as clarifications by Rule 9 NCAC 06B.0307.

14. *The oral presentations (See Findings 37-38) were permitted by Rules 9 NCAC 06A.0102 and 9 NCAC 06B.0307. Applicable procurement Rules permit clarifications, and do not require that clarifications be made in written form. Oral presentations referred to in §1.6 of the RFP appear consistent with §B.2, pg. 7, of the PEP regarding presentations to the Selection Committee.*

15. Proposed Conclusion 10: *Information presented by vendors to the TAC was included in the evaluation forms and recommendations of the Committee to the Selection Committee. The TAC reported in writing that: (a) "on 2/16/04, ACS stated that the SOAP technology together with "cluster-processing" can provide the performance needed;" (b) "on 2/16/04, ACS stated that the CICS software acts as a service broker for distribution [sic] user requests to the COBOL-based business components;" and (c) "on 2/16/04, ACS stated that TIFF format is used for document images." Griffith Aff., 48-50; Thong Aff., 44-46; Veranes Aff., 43-45.* ~~The State violated the PEP by failing to create a written report substantiating what occurred at the oral presentations.~~

16. Proposed Conclusion 11: ~~The State violated ITP Procurement Regulation 4.0 to the extent the State claims that ACS made any clarifications at its oral presentation upon which it relies, because those clarifications were not memorialized in writing.~~

Justification: This conclusion is based upon an argument of the Petitioner that mistakenly identifies ITS policies and procedures as "regulations" and subordinates ITS' Administrative Rules to these policies. The ITS Procurement Policies and Procedures state policies and procedures utilized by ITS in its procurement processes. These policies and procedures do not supersede the Administrative Rules found at 9 NCAC 06A and 06B. See Finding 40.

17. Proposed Conclusion 12: ~~The failure to preserve an adequate record of the oral presentations in violation of the procedures set forth in the RFP, PEP, and ITS regulations also prejudiced the rights of EDS. The State asserts that it concluded the CAS component of the ACS solution was found to comply with the 3-tier requirement of the Statewide Technical Architecture based on the ACS oral presentation. The ability of the public, including EDS, to investigate what occurred at the oral presentations, as well as the State's ability to introduce a record of what occurred without resorting to post-award litigation affidavits, are destroyed by the failure to abide by these requirements. As noted by the Court of Appeals in Watkins v. Board of Dental Examiners, 358 N.C. 190, 198, 593 S.E.2d 764, 768 (2004), "the preservation of a record for judicial review [is] a cornerstone of the Administrative Procedure Act in that it enables a reviewing court to determine whether an agency . . . has engaged in a reasoned evaluation and analysis of [the] evidence presented." If agencies were permitted to violate their own rules for preservation of the record with impunity, and thus impede the ability of citizens to question decisions, agencies would undermine this "cornerstone" of the Act.~~

Justification: As stated, this conclusion misstates facts upon which it depends. See Findings 37-39. This conclusion misstates the holding in Watkins v. Board of Dental Examiners, 358 N.C. 190, 198, 593 S.E.2d 764, 768 (2004). Watkins stands for the proposition that, at the conclusion of a contested case hearing, "an agency must base its findings of fact exclusively on evidence presented and facts officially noticed, all of which must be made a part of the official record for purposes of judicial review. 358 N.C. at 197-98, 593 S.E.2d at 768.

ADDITIONAL CONCLUSIONS OF LAW

18. *The Office of Information Technology Services shall be managed and administered by the State Chief Information Officer (CIO). The State Chief Information Officer shall be qualified*

by education and experience for the office. N.C.G.S. §147-33.76. The undersigned State CIO has more than 25 years of experience in information systems in both the public and private sectors. Prior to his appointment by Governor Mike Easley in 2002, he was the Chief Information Officer at the North Carolina Department of Justice, where he was responsible for more than eighty IT professionals. He spent more than a decade in the private sector before joining state government. He also worked for Unisys Corporation, supporting United Airlines as well as State of North Carolina clients, from 1985 until 1990. He held various positions at Sperry Corporation from 1979 to 1985.

19. *Petitioner failed to show an abuse of discretion, or that the State acted arbitrarily or capriciously in awarding the contract to ACS on the issues decided herein.*

20. *Compliance with the STA is a factual question rather than a legal question. Interpretation of contracts is a legal question. Davison v. Duke University, 282 N.C. 676; 194 S.E.2d 761 (1973). The STA is a collection of technical standards, best practices, rationales, and goals, and these are interpreted and applied by agencies.*

21. *Petitioner presented eight (8) issues in their protest letter of 23 April 2004. Their 10 June 2004 Request for Administrative Hearing does not identify issues with particularity, but does identify a basis sufficient to claim the status of an "aggrieved party" under N.C.G.S. §150B-2. EDS' 26 July 2004 prehearing statement includes seven (7) issues; but these issues differ from those presented in the protest letter and the request for administrative hearing. The issues presented in the protest letter of 23 April 2004 are the only issues for decision in this matter. To the extent that the prehearing statements filed in this matter differ from the issues presented in the protest letter, such issues are dismissed. Parties in a contested case action may not amend their petition for a contested case by means of a prehearing statement. Nailing v. Univ. of North Carolina-Chapel Hill, 117 N.C. App. 318, 451 S.E.2d 351 (1994); Rev. denied, 339 N.C. 614, 454 S.E.2d 255 (1995).*

22. *The expert offered by Petitioners, Mr. Jeff Parmet, is not credible as an expert witness on the subject of Technical Architecture. N.C.G.S. § 150B-41(d). Nye v. Nye, 100 N.C. App. 326, 396 S.E.2d 91 rev. denied 328 N.C. 92, 402 S.E.2d 416 (1991).*

23. *Petitioner's grounds for protest and argument state that ACS' proposal failed to meet the requirements for the location of an Integrated Test Facility. It is clear that there is no factual basis for this argument. See Finding 53.*

FINAL DECISION

Based on the foregoing, it is Ordered that:

      1. Petitioner's motion for summary judgment is denied, and summary judgment is granted to Respondent on the issues presented in Petitioner's Motion for Summary Judgment.

      2. Respondents' Motion for summary judgment is granted as to issue I.B.2 (Integrated Test Facilities).

      3. Respondents' Motion for Summary Judgment on the remaining issues identified by EDS is denied.

      4. A scheduling conference will be held to determine a hearing date for the remaining issues.

ORDERED this   28th day of April, 2005.

George Bakolia
State Chief Information Officer
Office of Information Technology Services

CERTIFICATE OF SERVICE

A copy of this Order was hand delivered and sent by U.S. Mail, first class postage affixed, this day to:

Mark A. Ash, Esq.
Mitchell Armbruster, Esq.
Smith, Anderson, Blount, Dorsett,
Mitchell & Jernigan, LLP
P.O. Box 2611
Raleigh NC 27602-2611

Renee Montgomery, Esq.
Susan Dunathan, Esq.
Parker, Poe, Adams & Bernstein, LLP
P.O. Box 389
Raleigh, NC 27602-0389

James A. Wellons, Esq.
Emery Milliken, Esq.
N.C. Dept. of Justice
114 West Edenton St.
9001 Mail Service Center
Raleigh, NC 27699-9001

This the 28th day of April, 2005.

Richard Bralford